BRIEF OF CURRY AND CURRY OPPOSING THE GRANT OF THE WRIT OF CERTIORARI

PART I.

STATEMENT OF THE CASE

This is an action brought by the employees of the Masonic Building Company under section 16(b) of the Fair Labor Standards Act of 1938, Stat. 1060, 29 U.S.C., Section 201 et. seq., to recover alleged unpaid minimum wages and overtime compensation with an additional equal amount as liquidated damages, as well as attorneys' fees and costs.

Issue was joined as to the applicability of the Act to the plaintiff employees, and as to the hours they worked during the period of time involved.

The Masonic Building Company owns and manages a six story building in Augusta, Georgia, known as the "Masonic Building." Plaintiff employees were employed by the Masonic Building Company as maintenance and service employees and performed services in the building as elevator operators, janitors, firemen and watchmen. The building was constructed by the Masons of Augusta primarily for the purpose of housing its several Masonic Lodges and Clubs. The Masonic Lodges and Clubs occupy two stories of the building, and the remaining four stories are rented by the Masonic Building Company to various tenants, i. e., insurance companies, a lumber broker, practicing lawyers, doctors, dentists, railroad companies for freight and passenger solicitors, and a brick and tile company.

No goods were produced for commerce within the building. No evidence was offered to show that any of the plaintiff employees were engaged in interstate commerce. No evidence was offered to show that any of the plaintiff employees ever directly served any tenant in the building who was alleged to be engaged in interstate commerce. No evidence was offered to show the number of hours worked by plaintiff employeees, or the alleged minimum wages and overtime due said employees, and no evidence was offered to show what part of plaintiff employees' work was in intrastate and what part was in interstate.

The case was tried before the Judge of the United States District Court for the Southern District of Georgia on November 26, 1942, and on December 16, 1942, the Court found that the plaintiff employees were not within the coverage of the Act and ordered a judgment for defendant.

On April 6, 1943, the Court made its formal findings of fact, conclusions of law, and entered its judgment.

On April 15, 1943, plaintiff employees filed a motion "to relieve the plaintiffs' from the findings of fact, conclusions of law, indicated opinion and judgment, because of the inadvertence, mistake, or surprise and excusable neglect of the plaintiffs' legal representative."

Incorporated in the above motion was one for a New Trial.

On April 19, 1943, the Motion for New Trial was denied. "The other motions apparently were never

formally overruled by any written order, but were orally or impliedly overruled." (See Order of Judge Lovett dated October 14, 1943.)

PART II.

CONTENTIONS OF RESPONDENT IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

First: The burden of proof is on the plaintiff employees.

Second: The pleadings failed to allege and the evidence completely and entirely failed to show that any goods were manufactured, processed, or produced in the building.

Third: The evidence completely and entirely failed to show that any of the plaintiff employees ever directly rendered a service to any tenant in the building who was engaged in interstate commerce.

Fourth: The evidence completely and entirely failed to show the number of hours worked and the wages received by the plaintiff employees.

Fifth: The evidence completely and entirely failed to show what part of plaintiff employees' work was done in intrastate and what part was in interstate.

Sixth: The Fair Labor Standards Act applies to employees engaged in interstate commerce and not to those employees whose activities merely affect or facilitate interstate commerce.

Seventh: The trial judge did not abuse his discretion in refusing to reopen the case and permit the plaintiff employees to introduce testimony which they had negligently failed to introduce on the trial of the case.

PART III.

DISCUSSION AND CITATION OF AUTHORITIES

FIRST

THE BURDEN OF PROOF IS ON THE PLAINTIFF EMPLOYEES

In the case of Warren-Bradshaw Drilling Company v. Hall, 317 U.S. 88, the Court said:

"The application of the Act depends upon the character of the employees' activities. A. B. Kirschbaum Co. v. Walling, supra (316 U.S. p. 524, 86 L. ed., 62 S. Ct. 1116). The burden was therefore upon respondents to prove that in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods within

the meaning of the Act, and that such production was for interstate commerce."

In the case of Wilkinson v. Noland (D.C.E.D. Va., 1941) 40 F. Supp. 1009, the Court said:—"The burden is still on the plaintiff, regardless of the defendant's failure to keep a record, to prove that he worked overtime and how much overtime he worked."

In the case of Rucker et. al. v. First National Bank of Miami, Oklahoma, Tenth Circuit, Court of Appeals, October 27, 1943, 138 Fed. Reporter (2d) 699 at head note 5, the Court said:—"The burden is upon one asserting coverage under Fair Labor Standards Act to show that employee is engaged in commerce or in production of goods for commerce, without regard to employer's business."

SECOND

THE PLEADINGS FAILED TO ALLEGE AND THE EVIDENCE COMPLETELY AND ENTIRELY FAILED TO SHOW THAT ANY GOODS WERE MANUFACTURED, PROCESSED, OR PRODUCED IN THE BUILDING.

An examination of the pleadings in this case will show that the plaintiff employees do not allege that any goods were manufactured, processed, or produced in the building, or that any of said plaintiff employees were engaged in the production of goods for commerce. Their case was based entirely and solely on the allegation that the employees were "engaged in commerce". They not only completely and entirely failed

to allege that any goods were manufactured, processed or produced in the building, but they just as completely failed to prove such manufacturing, processing or producing. As a matter of fact, if such testimony had been offered, it would have been inadmissable, for it would have illustrated no issue made by the pleadings.

THIRD

THE EVIDENCE COMPLETELY AND ENTIRELY FAILED TO SHOW THAT ANY OF THE PLAINTIFF EMPLOYEES EVER DIRECTLY RENDERED A SERVICE TO ANY TENANT IN THE BUILDING WHO WAS ENGAGED IN INTERSTATE COMMERCE.

The only plaintiff employee to testify in the case was Inez Coleman, and the substance of her testimony was as follows:

After October 24, 1938, and during a part of 1939, she worked on the second floor. She did maid work and cleaned up on the second floor. She went to work at seven o'clock and got off between eleven and twelve o'clock. (See record page 66).

Inez Coleman was shown not to have been in the employ of the Masonic Building Company, but in the employ of the Masonic Club, and the District Court, in its findings of fact, dated April 6, 1943, recognized this when it left Inez Coleman out of those found to be employees of the Masonic Building Company. (See record page 40). Inez Coleman did not except to this finding and she is not a party to this appeal. Her testi-

mony referred only to her employment and had no bearing on the other plaintiff employees.

The original and amended answer in the case admitted that the parties named as employees, with the exception of Inez Coleman, "were engaged in the maintenance, upkeep and operation of said building in the several capacities of elevator operators, janitors, janitresses and firemen," but it is respectfully submitted that this admission carries with it only the fact that these employees were employed in their several capacities and was entirely insufficient to show a direct service on their part to any tenant who was engaged in interstate commerce. The burden of proof is on the plaintiff employees and we submit that the burden is not carried until and unless it be shown that the employee rendered a direct service to a tenant who was engaged in interstate commerce.

FOURTH

THE EVIDENCE COMPLETELY AND ENTIRELY FAILED TO SHOW THE NUMBER OF HOURS WORKED AND THE WAGES RECEIVED BY THE PLAINTIFF EMPLOYEES.

As has already been shown, Inez Coleman was the only witness to testify as to the number of hours an employee worked and wages that an employee received. Her testiimony had reference only to her employment, and as she was found not to be an employee of the Masonic Building Company, and, as no appeal was taken on her behalf, her evidence, in so far as this appeal is concerned, has no probative value.

There was no attempt to prove that any minimum wages and overtime compensation were due any of the plaintiff employees, and under these circumstances, even though the record may have shown that the plaintiff employees were engaged in commerce and in the production of goods for commerce, there could be no recovery in this case.

In this connection, it was agreed between Counsel that they would stipulate "as to the time and the payments of the rents without the witnesses." (See pages 66 and 67 of the record). This stipulation was never entered into and no record or statement of the facts referred to in the contemplated stipulation was ever made a part of the record in this case, and the Court has never had any evidence upon which it could make an award based on the number of hours worked by the plaintiff employees and the alleged minimum and overtime wages that may be due said employees.

This Respondent, in its brief filed in the Circuit Court of Appeals, and on page 9, said:

> "The Appellee entered into an agreement to stipulate as to the time and the payment of the rents without the witnesses, and as to the hours and the pay of the employees. The fact that these stipulations have not already been entered into and that there is no evidence in the record with reference to the facts and things agreed to be covered by the stipulation, will not now make us take advantage of their absence from the record and we are agreeable to now stipulate them into the record."

Notwithstanding the above statement with reference to our willingness to stipulate "as to the time and the payment of the rents without the witnesses, and as to the hours and the pay of the employees," the plaintiff employees failed and refused to accept our offer to stipulate and up to this time the record is absolutely silent as to the number of hours worked, and the wages received by the plaintiff employees. The failure to prove these facts can not now be said to have been caused by the excusable neglect of Counsel for the plaintiff employees.

In Judge Lovett's Order of October 14, 1943, settling the contentions between counsel as to the truth of the proceedings and evidence, Judge Lovett makes this statement. "There was discussion between counsel and the court with respect to submitting stipulations covering additional facts after the conclusion of the hearing. The Reporter's transcript (pages 66 and 67 of the record) shows what was said. My understanding at that time was that a further stipulation would be submitted as to the time the several plaintiff-employees performed labor for the defendant-employer and the amounts that were paid them for their services, and that plaintiffs' counsel might file any additional interventions as to other employees who might request him so to do before the case was decided.***. No additional stipulations were submitted to me and no additional interventions were presented after the hearing,***."

Under these circumstances it will be seen that there is absolutely no evidence in the record to show the number of hours worked and the wages received by

the plaintiff employees, and, without this evidence, no verdict or judgment could be entered for the plaintiff employees.

In the case of Wilkinson et al. v. Noland Co., Inc., 40 Federal Supplement, 1009 at page 1013, the Court said:

> "It is not enough for a plaintiff to come into Court under this Act and assert that he is entitled to time and a half for overtime served. As in any other case, he must produce evidence that is convincing and prove his cause by the greater weight of evidence,*** 'Evidence must amount to something of relevant consequences and of substantial nature from which the fact in issue can be reasonably inferred. It does not consist of vague, uncertain, irrelevant matter, not carrying the quality of proof to produce conviction.' McDonald v. Robertson, 6 Cir., 104 F. 2nd, 945, 948. 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conviction.'"

FIFTH

THE EVIDENCE COMPLETELY AND ENTIRELY FAILED TO SHOW WHAT PART OF PLAINTIFF EMPLOYEES' WORK WAS DONE INTRASTATE AND WHAT PART WAS DONE INTERSTATE.

In the case of Jax Beer Co. v. Redfern (C. C. A. 5th, 1941), 124 F (2nd) 172, where the plaintiff's evidence

was too indefinite both as to the time spent unloading freight cars, as apart from his usual intrastate work, and also as to total hours worked and pay received, recovery was denied.

In the case of Cullum v. Stevens (D. C. N. D. TEX., 1942), 46 F. Supp. 73, the court said that the burden was on the plaintiff to show what time he spent in the production of goods for interstate commerce.

SIXTH

THE FAIR LABOR STANDARDS ACT OF 1938, APPLIES TO EMPLOYEES ENGAGED IN INTERSTATE COMMERCE OR IN THE PRODUCTION OF GOODS FOR INTERSTATE COMMERCE AND NOT TO THOSE EMPLOYEES WHOSE ACTIVITIES MERELY AFFECT OR FACILITATE INTERSTATE COMMERCE.

Up to this time, we have discussed this case on the theory that the plaintiff employees completely and entirely failed to allege or prove that any goods were manufactured, processed, or produced in the building; that they completely and entirely failed to show that any of them performed a service for a tenant who was engaged in commerce; that they completely and entirely failed to show the number of hours worked and the wages received by them; and that they completely and entirely failed to show what part of their work was done intrastate and what part was done interstate. It is our thought that the case should be disposed of on this basis, but if some of the tenants in the building were engaged in commerce, and if the plaintiff em-

ployees had been shown to have actually rendered to said tenants the character of services for which their complaint shows they were employed, this service would not constitute "engaging in commerce" within the meaning of the wage and hour provisions of the Fair Labor Standards Act of 1938.

Section 6(a) of the Fair Labor Standards Act of 1938 provides as follows:

> "Every employer shall pay to each of his employees, who is engaged in commerce or in the production of goods for commerce, wages at the following rates:-"

There have been numerous maintenance and service employee cases decided by the courts, both Federal and State, and by far the greater weight of these authorities establish the rule, that, the Act does not apply to employees whose activities merely affect or facilitate interstate commerce.

In the case of James B. Cecil, et al., v. Willie D. Gradison, Trustee, Ohio Court of Appeals, First Appellate District, decided November 17, 1941, the Court had under consideration maintenance employees engaged in operating elevators, and doing janitors' and engineers' work, and said that the Act should be read in the light of its declaration of policy,—

> "And when so read and limited, it is clear that the Act does not apply to employees of intrastate employers engaged in and actually performing intrastate acts, notwithstanding such intrastate acts in-

cidentally facilitate the interstate commerce or the production of goods for such commerce carried on by others with whom they are otherwise related."

In the case of Horace Lee Robinson v. Massachusetts Mutual Life Insurance Company, Tennessee Supreme Court, 158 S. W. (2nd) 441, the Court said:—

"We are of the opinion that plaintiff in error and those in whose behalf he sues are not engaged in interstate commerce or in the production of goods for commerce. We are wholly unable to relate the work in which plaintiff in error is engaged to the actual movement or flow of goods in interstate commerce. As we interpret the Act it is limited to those employees who contribute directly to the production of goods for interstate commerce."

In the case of Albert Brandell, et al., v. Continental Illinois National Bank and Trust Company of Chicago, United States District Court, Northern District of Illinois, Eastern Division, December 5, 1941, 43 Fed. Supp. 781, the Court had under consideration maintenance employees in an office building where the owner occupied one-third of the building and rented the other two-thirds, and the Court said:—

"Given the broadest interpretation, I do not see how the statute could be construed to cover these plaintiffs. We do not have here the case of a janitor or watchmen or firemen in a building given over exclusively or almost exclusively to a business engaged in interstate commerce. Defendant occupies about one-third of the building. The other portions are oc-

cupied by we know not whom (plaintiffs say some of the occupants are engaged in interstate commerce but that is their counsel's opinion. No facts are given from which the court can determine whether the allegation states the truth). As an office building the probabilities are that a large portion of the tenants are lawyers, doctors, accountants, architects, engineers and the like. Plaintiffs give no service to defendant except such as is incidental to their maintenance and servicing of the entire building.

In the case of Johnson v. Filstow, Inc., District Court, S. D. Florida, Miami Division, 43 Supp. 930, the Court said:—

"The Fair Labor Standards Act does not apply to businesses that merely affect interstate commerce. Swift and Company v. Wilkerson, 5 Cir. 124 F. (2nd) 176; Jax Beer Company v. R. J. Redfern, 5 Cor., 124 F. (2nd) 172; Gerdert v. Certified Poultry and Egg Co., Inc., D. C., 38 F. Supp 964."

In the case of Tate v. Empire Building Corporation, United States District Court, of Tennessee, Knoxville Division, June 2, 1942, the Court said:—

"In the Kirschbaum case, 124 Fed. (2nd) 567 (5 Labor Cases Sec. 60, 827), it was held that a building owner-lessor who furnishes tenants with elevator service, watchman, firemen, and engineer, carpenter, helper and porter must pay those employees as provided in the Act because their specific duties so related to the production of goods for interstate commerce or constituted an engaging in interstate commerce as to require an application of the Act. (Of

course if the wage provisions of the Act are to be applied the hours of service provisions are likewise applicable.) In the above cited case the court aligns certain cases it considered as either in agreement or disagreement with the result it reaches, and concludes with the observation that the question will not be set at rest until the Supreme Court makes an authoritative ruling upon the precise question.

"It is noteworthy that the conferees appointed to reconcile differences in the bill as passed by the Senate and that passed by the House rejected the House Amendment which included employees engaged in commerce in any industry affecting commerce. Of course the commerce referred to was interstate commerce. So the bill as passed, both as to hours and wages, applies to those engaged in interstate commerce or in the prodution of goods for interstate commerce, leaving out of the coverage those whose labor is performed in industries which merely affect interstate commerce. The bill as passed by the House would have left room for the construction here contended for, but the fact that the broader provision was rejected is significant and convinces me that the Congress only intended its coverage to include those employees whose labor directly operated upon interstate commerce and goods which were being manufactured for interstate commerce, and not those employees whose labor merely affected such commerce or was performed upon goods whose manufacture merely affected it."

In the case of Cochran v. Florida National Building Corporation, District Court, S. D. Florida, Miami Division, July 8, 1942, 45 F. Supp. 830, the Court in a case

where the facts are almost identical with the facts in the instant case, said:—

"The plaintiffs assert that the cases of A. B. Kirschbaum v. Walling, Administrator, and Arsenal Building Corporation et al., v. Walling Adminstrator, 62 S. Ct. 1116, 1117, 86 L. Ed., decided by the Supreme Court on June 1, 1942, require a holding that the parties are under the Fair Labor Standards Act so as to require compliance with the wages and hours provisions of the Act for those engaged in interstate commerce.

"The Court is of the opinion that the Kirschbaum case, supra, is not controlling. In the Kirschbaum case the employees were 'engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate commrece are produced.' The building there involved was not the ordinary office building in which no goods were produced for interstate commerce as in the instant case. The Kirschbaum case is supported by reason and by the wording of the statute in question. In that case employees actually handled the goods which were produced in the building and shipped in interstate commerce. Some of the employees produced heat, hot water, and steam necessary to the manufacturing operations. They furnished the tenants with light and power. They ran freight elevators, which start and finish the interstate journey of goods going from and coming to the tenants. They were engaged in a 'process or occupation necessary to the production' of goods for commerce.

"(1) This Court committed itself to the conclusion

many months ago in the case of Gerdert v. Certified Poultry and Egg Co., Inc., 38 F. Supp. 964, and in the case of Tucker v. Hitchcock, 44 F. Supp. 874, text 877, in which latter case the Court said:—

'The Court definitely concludes that the Fair Labor Standards Act does not attempt to regulate local transactions which merely affect interstate commerce except in the matter of production of goods for commerce or the sale of goods to be shipped, sold, and delivered in commerce, or intended to be shipped, sold, or delivered in interstate commerce.'"

In the case of the First National Bank Building of Chicago, to compel the building's compliance with the Fair Labor Standards Act, United States District Court of Illinois, decided October 17, 1942; the Court said:—

"Certainly the operating of an elevator or the sweeping of floors or washing of windows is not of itself interstate commerc, and at the most may be considered only as conditions or transactions affecting commerce. The Fair Labor Standards Act requires that the employees themselves must be either engaged in commerce or in the production of goods for commerce, not in activities or transactions which affect commerce. I am of the opinion that the controlling factor here is not the nature of the business in which the employer is engaged, but rather the nature of the duties which the employees are called upon to perform.*** I am convinced that the janitors and the elevator operators, by reason of thir activities are not engaged in this commerce or the production of these goods for commerce, as to bring

them under the provisions of the Act, and this is not in conflict with the holding in either case of A. B. Kirschbaum v. Walling, Adminstrator, or Arsenal Building Corporation v. Walling, Adminstrator, decided by the Supreme Court of the United States on June 1, 1942, and reported in 5 WHR, 442. In both of those cases the employees actually handled the goods produced in the building and shipped in interstate commerce. They moved the goods up and down from story to story in their elevators, thus starting and finishing the interstate journey of the goods going to and from the tenants; furnished the light and power to drive the machines, as well as the heat, hot water and steam necessary to the manufacturing operations; cleaned the premises and swept from the floors large amounts of debris caused by the cutting and making of the garments. In the case at bar plaintiffs perform none of these activities."

In the case of Johnson et al. v. Dallas Downtown Development Co., 132 Federal Reporter (2nd Series) 287, it was said in head notes 1, 3 and 4, as follows:

1. "Where employer's only business was owning and operating office building and no tenants or other persons were engaged in production of goods in or about such building or in production of goods elsewhere, elevator operators and porters employed in such building were not engaged in the 'production of goods for commerce' within meaning of wage and hour provisions of Fair Labor Standards Act of 1938, Sections 3(j), 6(a), 7(a), 29 U. S. C. A. Sections 203(j), 206(a), 207(a)."

3. "Congress did not intend that wage and hour provisions of Fair Labor Standards Act with respect to those who are only engaged in commerce should be extended to cover every person whose labor is of use or convenience or in some fashion contributes to comfort of one who is so engaged. Fair Labor Standards Act of 1938, Sections 3(j), 6(a), 7(a), 29 U. S. C. A. Sections 203(j), 206(a), 207(a)."

4. "Elevator operators and porters in office building, some of the tenants of which were engaged in commerce, were not 'engaged in commerce' within meaning of wage and hour provisions of Fair Labor Standards Act. Fair Labor Standards Act of 1938, Sections 6(a), 7(a), 29 U. S. C. A. Sections 206(a), 207(a)."

In the same case above at page 289, the Court said:

"Appellants apparently rely upon Arsenal Building Corporation and Kirschbaum v. Walling * * *. There, some of the employees were, as here, elevator operators, porters, and janitors in the employ of owners and operators of large buildings, but there the tenants of both buildings were principally engaged in the production of goods for commerce, and some of the employees in some instances handled some of the goods so produced. It is perfectly plain that appellants' case is not helped by that case."

The principle here contended for was again declared in the case of McLeod v. Threlkeld et. al., 131 Federal

Reporter (2nd Series) 880, where the Court at head note 2, said:

2. "Where employer, by contractural arrangement with railroad furnishes boarding and bedding services which were available to railroad's maintenance-of-way workers, employees who merely cooked meals, washed dishes and made beds for boarders who worked for railroad but who himself performed no services for railroad and over whom railroad exercised no authority was not 'engaged in commerce' within meaning of wage and hour provisions of Fair Labor Standards Act and was not entitled to benefits thereunder. Fair Labor Standards Act of 1938, Sections 1-19 and Sections 6, 7, 16(b), 29 U. S. C. A. Sections 201-219, 206, 207, 216(b)."

In the case of Rucker et al. v. First National Bank of Miami, Oklahoma, U. S. Circuit Court of Appeals, Tenth Circuit, October 27, 1943, 138 Fed. (2nd) 699 at h. n. 8, the Court said:

"The phrase 'engaged in commerce' when used to measure coverage under Fair Labor Standards Act, encompasses only employment actually in movement of commerce or activities so closely related thereto as to be practically a part of it."

A petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit in the case of Tom Johnson et al. v. Dallas Downtown Development Co., was denied April 19, 1943.

A petition for writ of certiorari to the Supreme Court

of New York in the case of Stoike v. First National Bank was denied October 11, 1943.

A petition for writ of certiorari to the Circuit Court of appeals for the Fifth Circuit in the case of L. McLeod v. M. C. Threlkeld was granted on April 5, 1943.

Hearing on the writ of certiorari in the McLeod v. Threlkeld was had, and on June 11, 1943, this Court decided the case (319 U. S. 1248), and at head notes 1, 2, 3.., 4, and 5, said:—

1. "In the Federal Labor Standards Act of 1938 (29 USC Sections 201-219), Congress did not intend that the regulations of hours and wages should extend to the furthest reaches of Federal authority."

2. "A cook employed by a contractor to prepare and serve meals to maintenance-of-way employees of an interstate railroad in a car running on the railroad's tracks and set conveniently to the place of work of such employees, is not 'engaged in commerce' within the meaning of the Federal Fair Labor Standards Act of 1938 (29 USC Sections 201-219)."

3. "There is no single concept of interstate commerce which can be applied to every Federal statute regulating commerce."

4. "The test of the applicability of the Federal Employer's Liability Act, that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered as in that commerce, is applicable to employ-

ments 'in commerce' under the Federal Fair Labor Standards Act (29 USC Sections 201-219)."

5. "The test under the Federal Labor Standards Act of 1938 (29 USC Sections 201-219) whether an employee is engaged in commerce within the meaning of the Act is not whether the employee's activities affect or directly relate to interstate commerce, but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

For other cases holding that maintenance and service employees do not come within the provisions of the Act, see:—Albrecht v. Deposit Guaranty Bank and Trust Company, Inc., (U.S.D.C.S.D. Miss., Jackson Division, Nov. 20, 1942). In the matter of the liquidation of New York Title and Mortage Company, New York Supreme Court, N.Y.L.J., February 6, 1943, page 519; Lofther et al. v. First National Bank of Chicago, 48 F. Supp. 692; Johnson v. Hamilton National Bank, Tennessee Chancery Court, Oct. 12, 1942; Callus et. al. (U.S.D.C.S.D. of New York , May 28, 1943); Patterson et. al. v. Memphis Cotton Exchange Realty Company, Inc., Jan. 18, 1943, Tennessee Chancery Court, Shelby County, Tennessee; Convey v. Omaha National Bank (U.S.D.C., District of Nebraska, Feb. 9, 1943); Johnson v. Great National Life Ins. Co., Texas Court Civil Appeals, Nov. 20, 1942; Hinkler v. Eighty-three Maiden Lane Corp. (U.S.D.C.S.D. N. Y., May 14, 1943), 50 F. Supp. 263; Stoike v. First National Bank (N.Y. Court of Appeals, April 15, 1943; Wideman et. al. v. Blanchard and Calhoun Realty Co., (U.S. D.C.S.D. Georgia, June 21, 1943), 50 F. Supp. 626; Baum v. A. C. Office Building Company, Kansas Supreme Court, Nov. 6, 1943; Building Service Employees

Union v. Trenton Trust Company (U.S.D.C. District of New Jersey, Dec. 8, 1943).

SEVENTH

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN REFUSING TO REOPEN THE CASE AND PERMIT THE PLAINTIFF EMPLOYEES TO INTRODUCE TESTIMONY WHICH THEY HAD NEGLIGENTLY FAILED TO INTRODUCE ON THE TRIAL OF THE CASE.

In the very beginning of this discussion, we wish to call the Court's attention to the fact that this case was stenographically reported and that every agreement and stipulation was reported into the record.

By direction from the Circuit Court of Appeals "to settle the contentions between counsel as to what the truth of the proceedings and evidence is," Judge Lovett, in his order of October the 14th, 1943, said:

"This case was stenographically reported. The reporter's transcript of the evidence appears in the record. It is correct. * * * * * There was discussion between counsel and the court with respect to submitting stipulations covering additional facts after the conclusion of the hearing. The reporter's transcript (pages 66 and 57 of the record) shows what was said. My understanding at that time was that a further stipulation would be submitted as to the time the several plaintiff-employees performed labor for the defendant-employer and the amounts that were paid them for their services, and that plaintiffs' coun-

sel might file any additional interventions as to other employees who might request him so to do before the case was decided."

This finding, by the Court, was supported by the stenographer's report. The Circuit Court of Appeals in their decision in this case (138 F. (2nd) 817, with reference to this ruling, said:

"The District Judge refused this relief, and error is specified on this ruling. The rule provides the Court 'may relieve'. The matter lies in the discretion of the judge. We cannot say it was abused here. Neither they nor their employer appear to have thought they were under the Act. There is no serious miscarriage of justice **if by their neglect** they have failed to get a windfall in past wages."

The stenographic report shows that at the very beginning of the trial, counsel read into the record every stipulation that had been entered into prior to the trial. (See pages 59, 60 and 61 of the record.

The stenographic report also shows that his failure to produce his alleged fifteen (15) witnesses was not on account of any pressure exerted by the Court, but that the case was closed by counsel for the plaintiff-employees of his own volition and after offering only one of the plaintiff-employees as a witness.

The stenographic report also shows what facts were to be stipulated into the record subsequent to the trial. On page 66 of the record, we find this:

"THE COURT: You can furnish or have furnished

to Mr. Persky information as to how the various rents are paid?

A. Yes Sir.

MR. PERSKY: Your Honor, with that information I think Mr. Curry and I can stipulate on the rest of it, **the time of the various employees, and that would be our case.**

MR. CURRY: We will have no trouble about that, Judge; **we will stipulate as to the time and the payment of the rents without witnesses."**

On page 67 of the record and at the close of the case, we have another record as to what was agreed to be stipulated. It appears in the following way:

"Note: It was agreed that Mr. Persky might file interventions as to any other employees who asked him to, and that he and Mr. Curry would stipulate as to the hours and the pay of the employees."

There were no other stipulations between counsel than those appearing in the stenographic report, and the record will show that, with reference to these, they have never been read into the record.

The relief prayed for in the motion is that provided in Rule of Civil Procedure 60(b). It was taken from Section 473 of the California Code of Civil Procedure. We have been unable to find any Federal Court interpretations of the section, but there are many by the courts of California and they are unanimous in holding

that there must be "excusable" negligence and not the simple neglect that appears in this case.

In the case of Watson v. Columbia Basin Development Company, decided by the District Court of Appeal, Third District, California, Aug. 13, 1913, 135 Pac. 511, the court at h. n. 4, said:

> "Before an appellate court may disturb an order denying a motion to set aside a judgment Code Civ. Proc. Sect. 473, authorizing the vacation of a judgement for mistake, inadvertence, excusable neglect, etc., it must clearly appear that the trial court has abused its discretion."

In the same case above at page 513, the Court said:

> "The rule is entirely familiar that 'before an appellate court is authorized to disturb an order made upon a motion to set aside judgment under the provisions of section 473 of the Code of Civil procedure, it must clearly appear that the court making the order has abused the discretion committed to it,' otherwise stated, that the order is without evidence to sustain it."

In the case of Kalson v. Percival, District Court of Appeals, First District Division, California, decided Dec. 1, 1932, 16 Pac. 2nd. 331 at 332, said:

> "No reasonable, legal excuse is shown by the facts recited for defendant's failure to appear and defend this action. Manifestly, his neglect was due solely to the feeling of innocence of responsibility for plaintiff's injuries, which he claims to have had."

In the case of Peuryn Land Co. v. Okahori, District Court of Appeals, Third District, California, decided April 19, 1918, 173 Pac. 612, the Court at h. n. 6, said:

"That an attorney was mistaken in his judgment that it was useless to make a defense to the action is not the kind of mistake for which a default judgment can be set aside under Code Civil Proc. Sect. 473, though it might be the basis of an independent action for damages against the attorney."

In the case of Lee v. Dawson, decided by the District Court of Appeals Division 1, California, April 22, 1941, 112 P. 2nd 683, the Court at head note 7 said:—

"Where affidavit in support of motion to set aside submission for further argument urged that affiant intended to argue case but that when counsel for opposite parties submitted the cause he was taken by surprise and mistakenly and inadvertently failed to ask permission to argue, the reviewing court could not assume that the trial court abused its discretion in refusing to set the submision aside to permit counsel to argue the case."

The Circuit Court of Appeals, speaking through Judge Sibley, in their decision affirming the judgment of the District Court in this case, said:

"We may say further that we hardly think the new evidence would change the matter. It is stretching the Act and the Kirschbaum case too far for us to say that an office building shall become a factory be-

cause two among many tenants are found to be making some eyeglasses and false teeth."

Respectfully submitted,

W. INMAN CURRY

JEFF D. CURRY

CURRY & CURRY,
1217-19 Southern
Finance Building,
Augusta, Georgia.

Attorneys for
Respondent.